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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/615,249	07/08/2003	Edward L. Rapp	02280.003720.	8220

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EXAMINER	
PRATT, HELEN F	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 01/04/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/615,249	RAPP ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 20 of copending Application No. 's 10/272571 and claims 1-20 of 10/271,710. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of '571 do not exclude any mixing sensitive components into the composition at a temperature and shear which would not deleteriously affect the sensitive component. As to '249, the energy base of '502 is not excluded by '249 or it could be the same.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 112

Claims 1-3,7, 15, 17,19, 20 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 1-3, 7, 15, 17,19, 20 are indefinite in the use of the terms hedonic score, confidence level, and acceptability. These measurements are all based on subjective measurements (page 7, para. 0030) on which the particular parameters which make up each score could vary.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Kelly et al. (4,055,669).

The hedonic score as in claim 1 of at least 5.2 is shown because the composition of Kelly can be a bar and does provide energy and nothing is seen that the bar would not have the claimed hedonic value (abstract).

A confidence level of 60% is seen to have been shown as it would inherently have this value since the product is an energy bar (abstract) as in claim 2 and acceptability since it is an energy bar and would inherently have this consumer acceptability as in claim 3 absent a showing to the contrary.

Kelly et al. disclose making a binder composition of fat, sodium caseinate (protein) and milk solids, and sugar to make a homogenous mixture, to which sensitive components such as vitamins and minerals, emulsifiers and colors are added at a temperature, and within a degree of mixing in a mixer that will not crush the particles as in claims 4, and 8 (col. 5, lines 54-66, col. 6, lines 29-60). The reference discloses that the blending is a critical operation that was done at temperatures from 100 to 140 F. and limited to the extent necessary to wet the added cereal particles.

The functional ingredients are seen to have been strategically positioned as they are positively mixed into the bar as in claims 5 and 9 (col. 6, lines 29-60).

The protein powder is sodium caseinate which has been rolled with other ingredients to the size of 50 microns as in claims 6 and 10. The protein powders would have had to have been about the claimed caseinate size of at least 35 microns since all the ingredients are 50 microns (col. 6, lines 38-60).

This composition would make a chewy energy bar with an acceptability of at least 4.9 due to the use of the claimed ingredients as in claim 7 (col. 6, lines 29-60).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-13, 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kelly et al. in view of Froseth et al. (6,592,915) and Rombauer et al., p. 708.

The limitations of claims 1-10 have been disclosed above and are obvious for those reasons. Further, Froseth et al. disclose as in claim 4 adding sensitive food ingredients to a binder (abstract and Fig. 5A and col. 4, lines 36-44, col. 14, lines 61-70). The reference discloses that flavors are added last to avoid adverse affects from too much heat (col. 13, lines 9-11). Nothing is seen that the degree of mixing affects the sensitive components. The reference is aware that various process parameters such as temperature affects the ingredients. The velocity of mixing is well known to affect ingredients, hence the settings on mixers of slow to fast. Therefore, it would have been obvious to make a composition in which the temperature and shear were controlled.

Claim 11 further requires that an energy bar matrix is made by mixing a solid component into a syrup to make a energy bar matrix, and then mixing the matrix with a fat-carbohydrate matrix. Rombauer et al. disclose, in the recipe Pfeffernusse, an energy matrix made of corn syrup which is combined with a solid component which is grated lemon rind, which is mixed into a fat-carbohydrate matrix, which is butter and sugar (page 708). The energy bar is seen to be lubricious since it contains fat. Also, as in In re Levin: This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing

food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Therefore, it would have been obvious to make a composition with matrixes as shown by Rombauer as required in the composition of Kelly.

Claim 12 further requires adding well-known types of candies, which contain fat and carbohydrates into the energy bar. However, nothing new is seen in adding a fat-carbohydrate mixture as in chocolate chip cookies or bars, which contain chocolate chips or in cookies which contain the large chocolate kiss (Rombauer, page 705, chocolate-chip drop cookies). Therefore, it would have been obvious to add candy inclusions into an energy bar matrix for their known function of adding more fat and sugar in a tasteful formulation.

Claim 13 further requires the addition of fortification ingredients. Kelly et al. disclose the addition of vitamins and minerals to the binder of that composition (col. 5, lines 40-51). Therefore, it would have been obvious to fortify as shown by Kelly et al.

The limitations of claim 18 have been disclosed above by the above combination of references which would give the hedonic gains as in claims 19 and 20. Therefore, it would have been obvious to make the composition by processing sensitive ingredients

as shown by Kelly et al., and strategically positioning functional ingredients as shown by Kelly and to use a fat carbohydrate matrix as disclosed by Rombauer et al. in the process of Kelly et al. if one wanted to add more fat as shown by adding the candy inclusions of Rombauer (chocolate chips) or the fat carbohydrate matrix as shown on page 708 of Rombauer et al.

Claims 14-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Rombauer et al. (Joy of Cooking, page 708).

Claims 14 further and 16 require that an energy bar matrix is made by mixing a solid component into a syrup to make a energy bar matrix, and then mixing the matrix with a fat-carbohydrate matrix. Rombauer et al. disclose, in the recipe Pfeffernusse, an energy matrix made of corn syrup which is combined with a solid component, grated lemon rind, which is mixed into a fat-carbohydrate matrix (butter and sugar)(page 708). The composition is considered to have a lubricious mouthfeel since the claimed ingredients are used.

The composition is considered to have the claimed hedonic score as in claims 15 and 17 as the composition has been shown.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 1-2-05

H. Pratt

HELEN PRATT
PRIMARY EXAMINER